

## INFORMAL ADVISORY OPINION NO. 2002-2

An organization, through its attorney, filed a charge with the Hawaii State Ethics Commission against a state employee. The charge alleged that the state employee violated Hawaii Revised Statutes (HRS) sections 84-12 and 84-13 in his dealings with the organization. HRS sections 84-12 and 84-13 are two sections of the Hawaii State Ethics Code, set forth in chapter 84, HRS. The private organization that filed the charge was created to promote and support certain interests of an individual. Pursuant to HRS section 84-31(b), a copy of the charge was sent to the state employee for his response. Through his attorney, a deputy attorney general, the employee filed an answer to the charge. In his answer, the employee denied violating HRS sections 84-12 and 84-13.

Subsequent to the organization's filing of its charge with the Hawaii State Ethics Commission, the organization, and the individual whose interests it promoted, filed a federal civil lawsuit against the state employee and the employee's agency. The federal lawsuit alleged violations of the First and Fourteenth Amendments of the United States Constitution, and violations of 42 USC § 1983. The federal lawsuit also fully incorporated and had attached to it the charge filed with the Hawaii State Ethics Commission.

The charge first alleged that the state employee violated HRS section 84-12, the "Confidential information" section of the State Ethics Code. This section of the State Ethics Code reads as follows:

**§ 84-12 Confidential information.** No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone.

This section of the State Ethics Code essentially prohibits a state employee or legislator from disclosing any confidential state information, or using such information for personal gain or for the benefit of anyone.

The charge alleged that the state employee violated HRS section 84-12 by releasing information regarding various investigations initiated by his agency against the organization. The charge alleged that the employee repeatedly disclosed to the media that the organization was the "target" of investigations by his agency. The charge also alleged that the state employee repeatedly made public statements to the media of his suspicions or conclusions of wrongdoing. The charge also alleged that the state employee selectively released partial information to the media before the completion of the investigations. The charge also made a number of specific allegations about particular statements made to the media.

Finally, the charge alleged that, on one occasion, the state agency gave notice to the organization of certain insufficiencies in documents that it had filed with the agency. The charge claimed that the state employee's agency's law provided organizations with an opportunity to correct insufficiencies within a certain time period. If not corrected within this time period, then the agency may give public notice of the insufficiencies. According to the charge, the state employee promised the organization that it would have a certain

number of days in addition to the time period provided in the law to correct any insufficiencies. The charge claimed that despite this agreement, the state employee publicly released information of the insufficiencies before the end of the promised time period.

The charge also alleged that the state employee violated HRS section 84-13, the "Fair treatment" section of the State Ethics Code. HRS section 84-13 reads as follows:

**§ 84-13 Fair treatment.** No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment, or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or with a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

The charge alleged that the state employee violated HRS section 84-13 in a number of ways. First, during a time period critical to the organization, the state employee contacted the co-chair of the organization and told him that his simultaneous service as co-chair of the organization and as chair of his own similar organization was not lawful with regard to a law the state employee's agency administered and enforced. Under pressure from the state employee, the charge claimed, the co-chair stepped down from his position in the organization. After the critical time period had passed, the state employee's agency issued a formal opinion stating that the co-chair's dual roles had been lawful and that his resignation was not required by law. The charge also alleged that, during this critical time period, the state employee advised the organization that certain activities it had planned would violate a law that the state employee's agency administered and enforced.

The organization refrained from these activities notwithstanding its conviction that they were lawful and appropriate. After the critical time period had passed, the agency repudiated the assertion that the activities would have been unlawful. Next, with respect to this critical time period, the charge alleged that the state employee was quoted in a media source as making a derogatory statement about the individual whose interests were promoted by the organization. The derogatory statement by the state employee asserted that the individual was highly skilled in circumventing the laws administered and enforced by the state employee's agency. The charge also alleged that the state employee caused or permitted to be displayed in the public area of his agency's office a piece of derogatory material insinuating that the individual, whose interests were being promoted by the organization, had a disdainful attitude with respect to the laws the state employee's agency administered and enforced. Finally, the charge also generally alleged that the state employee's negative public comments about the individual and his supporting organization violated HRS section 84-13. These comments by the state employee asserted or suggested violations by the individual and his supporting organization of laws administered and enforced by the state employee's agency.

In his answer to the charge regarding violations of HRS section 84-12, the state employee did not deny that he made the statements that the charge attributed to him. The employee did deny, however, that he disclosed any information that was not available to the public. The employee's answer explained that a provision of the agency's law that prohibited the disclosure of certain agency information was ruled unconstitutional by a federal court some years ago. As a result of this ruling, the agency did not treat any of its information as confidential. The answer maintained that all information before the agency was available to the public. The answer denied that the employee released confidential information because the information referred to in the charge was not confidential.

The answer did not dispute any of the facts set forth in the charge regarding possible violations of HRS section 84-13. However, the employee's answer denied that he used his official position to secure or grant unwarranted advantages or treatment for himself or others in violation of HRS section 84-13. The answer further stated that there was no evidence of an intent to damage the organization. The answer stated that there was no evidence to show that the employee used his position to benefit the organization's competitors. The answer claimed that the state employee was simply doing his job.

In reviewing allegations of violations of HRS section 84-12, the Commission noted that HRS section 84-12 prohibits a state employee or legislator from disclosing any state information that by law or by practice is not available to the public. HRS section 84-12 also forbids a state employee or legislator from using, for the employee's or legislator's personal gain or for the benefit of anyone, any state information that is not available by law or by practice to the public. In Informal Advisory Opinion No. 99-2, the Hawaii State Ethics Commission noted that HRS section 84-12 was enacted prior to the State's adoption of the Uniform Information Practices Act (UIPA). The Commission noted that HRS section 84-12 was affected by the UIPA. Under the UIPA, all government records are open to the public

unless the records are specifically made confidential by law.<sup>1</sup> A state agency may not opt to keep a government record confidential “by practice.” In order to be confidential, a government record must be confidential by virtue of a specific law, or in accordance with one or more of five exceptions to public disclosure set forth in the UIPA.

Some years ago, the law governing the state employee’s agency contained a provision that made certain information confidential. A federal court held that this provision was unconstitutional and enjoined enforcement of the law. The federal court’s action left the agency without any law mandating the confidentiality of its proceedings. Subsequent to the time of the federal court’s decision, the Legislature has not amended the laws of the agency to add any confidentiality provisions. As a consequence, the agency treats all of its information as public information.

The charge argued that the Office of Information Practices (OIP), the state agency that administers the UIPA, has held in its opinions that information regarding the identity of “targets” of investigations of criminal acts may not be released by government agencies unless and until “enforcement action” is commenced. Because violations of the state employee’s agency’s laws could possibly be treated as criminal matters, the charge argued that information regarding investigations of any alleged violation of the agency’s laws was “confidential” prior to the commencement of any enforcement actions. Thus, the charge argued, the state employee’s public disclosure of information regarding investigations of the organization prior to the conclusion of these investigations was a disclosure of “confidential information” in violation of HRS section 84-12.

The charge had attached to it several OIP opinions in support of this argument. The Hawaii State Ethics Commission reviewed these opinions, along with HRS chapter 92F, the UIPA. The Hawaii State Ethics Commission also received information from the OIP about this issue. Based on its review, the Hawaii State Ethics Commission believed that the charge misinterpreted the UIPA. The UIPA essentially makes all government records public. The UIPA then carves out exceptions to this general rule.<sup>2</sup> The charge maintained

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<sup>1</sup>HRS 92F-11 reads:

**§ 92F-11 Affirmative agency disclosure responsibilities.** (a) All government records are open to public inspection unless access is restricted or closed by law.

<sup>2</sup>The exceptions to the general rule of agency disclosure are listed in HRS section 92F-13, which reads:

**§ 92F-13 Government records; exceptions to general rule.** This part shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

that, because information disclosed by the state employee could be covered by one or more of these exceptions, this information was necessarily confidential and could not have been disclosed. This argument, however, misconstrued the UIPA.

The UIPA states that all government records are public, unless made confidential by a specific statute. If not, the records are public records, although the UIPA, through a number of exceptions, allows government agencies to treat certain public records as confidential, if the agencies choose to utilize any of the UIPA exceptions to bar release of any government records. The UIPA does not mandate that agencies must treat any public record as confidential. Instead, the UIPA allows an agency to refuse to disclose the information if (1) the agency wishes to keep the information confidential, and (2) the agency can avail itself of one or more of the exceptions to disclosure set forth in the UIPA. On the other hand, under the UIPA, an agency must treat any government record as public information, unless there is a specific statute mandating confidentiality, or unless the agency utilizes any of the exceptions to disclosure set forth in the UIPA.<sup>3</sup>

In this case, the state employee's agency's law contained no provisions mandating confidentiality. Thus, there was no law that expressly prohibited the state employee from publicly disclosing any of his office's government records about its proceedings. It may have been possible for the state employee to have refused to disclose information concerning agency matters based on one or more of the exceptions to the UIPA's general rule of disclosure. However, there was nothing in the UIPA that required him to keep any government record information confidential.

The Commission's review of the state employee's agency's law and the UIPA indicated that there was no statutory requirement that information regarding agency proceedings be treated as confidential. The agency had opted to treat all of this information as public information. Because information released by the state employee was not confidential, the Hawaii State Ethics Commission could not say that the state employee had violated HRS section 84-12.

The charge also specifically alleged that the state employee had violated HRS section 84-12 by prematurely releasing to the public information about insufficiencies in filings made by the organization. The charge alleged that the organization received a notice of insufficiencies in its filings from the agency. The charge claimed that the agency allowed

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- (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and
  - (5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records of transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

<sup>3</sup>In a later written communication to the Hawaii State Ethics Commission, the complainant acknowledged that the UIPA would not, by itself, establish that the agency's information was confidential.

the organization an opportunity to correct or explain any insufficiency and that only when the organization failed to do so within a time allowed by the agency would public notice of any insufficiency be published. The charge claimed that the state employee agreed that the organization would have a certain number of days to correct apparent insufficiencies. Despite this agreement, the charge claims the state employee disclosed the insufficiencies to the media before the end of the days granted by the state employee.

The Hawaii State Ethics Commission reviewed the section of the agency's law cited by the charge. The charge quoted only certain portions of this section. In its entirety, this section clearly stated that corrections to insufficiencies must be submitted to the agency no later than a specific number of days after notice of the insufficiency had been mailed. It could be argued that an early disclosure of the identity of an organization that had made an insufficient filing would violate HRS section 84-12. It appeared, however, that, in this situation, there was no premature disclosure of insufficiencies. The law mandated that the correction to any insufficiency had to be received by the agency by a certain time after the notice of the insufficiency. If there was no correction received by that time, then the agency could publish the identity of the organization. In this case, the disclosure of the organization's identity came well after the time period set forth by the agency's statute.

The charge noted that the state employee agreed to a certain number of days for the organization to address insufficiencies. The state employee provided extra days for compliance well beyond the time period set forth in the agency's statute. However, there did not appear to be any legal authority that allowed the state employee to waive the time period set forth in the law.<sup>4</sup> According to the law, once the statutory time period had passed, the agency could publish the identities of those who had filed insufficient reports. At this point, the information became public. For this reason, it appeared that by the time the state employee disclosed this information to the media, it was already public information. Thus, there was no violation of HRS section 84-12.

Subsequent to the filing of the charge, the complainant raised a new argument with the Hawaii State Ethics Commission. The complainant argued that the information that the state employee disclosed was confidential not by statute, but by a constitutional provision. Article I, Section 6 of the Hawaii State Constitution establishes a constitutional right to privacy in Hawaii. This section reads, in its entirety, as follows:

The right of the people to privacy is recognized and shall not be infringed without a showing of a compelling state interest. The Legislature shall take affirmative steps to implement this right.

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<sup>4</sup>See, for example, OIP Advisory Opinion 90-2, which discusses the effect of a confidentiality agreement on the UIPA and the Freedom of Information Act (FOIA):

It is a well-settled principle of public records law that government promises of confidentiality cannot override FOIA in its mandate of public access to government records. . . . the UIPA's provisions determine which government records are confidential or public. Agencies simply may not override these basic principles of the UIPA by contract.

The complainant argued that this constitutional provision prohibited the release of information identifying the “target” of a criminal investigation. The complainant argued that this constitutional provision established information regarding investigations of the organization as confidential information. The state employee’s release of this information, the complainant argued, violated HRS section 84-12 because the information was made confidential by Article I, Section 6 of the Hawaii State Constitution.

In support of the contention that Article I, Section 6 of the Hawaii State Constitution established that the information that was released by the state employee was confidential, the complainant cited a number of court cases from other jurisdictions. According to the complainant, these cases held that an individual had a privacy interest in information identifying the individual as the subject of a criminal investigation. The complainant acknowledged that there were no Hawaii cases or statutes on point. Despite the lack of Hawaii law, the complainant urged the Hawaii State Ethics Commission to acknowledge a constitutionally based privacy interest in this situation, and, consequently, to find a violation of HRS section 84-12.

While the Commission did believe it had the authority to interpret other laws in order to determine whether or not the Hawaii State Ethics Code had been violated, the Hawaii State Ethics Commission did not believe that it had primary jurisdiction over this matter. The complainant was, in essence, alleging a violation of a constitutional right to privacy. The claimed HRS 84-12 violation was merely derivative of the alleged constitutional violation. The Commission believed that the courts of the State of Hawaii were the appropriate forum for determining whether or not the complainant’s constitutional right to privacy was violated by the state employee’s actions. The Commission noted that Hawaii courts had several times construed Article I, Section 6 of the Constitution of the State of Hawaii.<sup>5</sup> In this situation, where the essence of the claim was a violation of a constitutional right, the Commission believed that Hawaii state courts were the appropriate forum to review such a claim.

The Hawaii State Ethics Commission believed that the charge’s allegations of violations of HRS section 84-12 could not be sustained. The complainant initially based these allegations on statutory law. However, the Commission’s review of both the state agency’s law and the UIPA indicated that there was no statute that established the information that was released as confidential. It appeared that all of this information was available to the public. For this reason, the Commission believed that the state employee did not violate HRS section 84-12 based on the complainant’s statutory arguments.

The complainant also argued that the confidentiality of the information that was disclosed was established by Article I, Section 6 of Hawaii’s State Constitution. The complainant could not cite any Hawaii statutes or case law supporting this interpretation of Article I, Section 6. The Hawaii State Ethics Commission believed that whether or not the complainant had a constitutional privacy interest in the information that was disclosed was

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<sup>5</sup>See, for example, Nakano v. Matayoshi, 68 Haw. 140 (1985); State v. Kam, 69 Haw. 483 (1988); McCloskey v. Honolulu Police Dep’t, 71 Haw. 568 (1990).

a matter for Hawaii's courts to decide. The Hawaii State Ethics Commission believed that, in this instance, the claim was essentially that of a constitutional violation. The allegation of an HRS section 84-12 violation was simply a by-product of the constitutional issue. The courts, and not the Hawaii State Ethics Commission, had special competence to decide this matter.

The charge, as stated above, also alleged that the state employee violated HRS section 84-13 in a number of specific situations. Two of these situations concerned advice that the state employee gave to the organization. This advice was not upheld by the state employee's agency when it reviewed the advice at a later date. Another situation concerned a statement that the employee made to the media. The final situation concerned displaying derogatory material in the state employee's agency's office. In addition to these specific situations, the charge also generally alleged that the state employee's various negative comments about the organization and the individual it supported violated HRS section 84-13.

The charge alleged that shortly before a critical time period, the state employee contacted the co-chair of the organization and informed him that he could not simultaneously serve as co-chair of the organization and as chair of his own similar organization. According to the charge, the co-chair stepped down from his position as co-chair of the organization as a result of the employee's statements.

The state employee apparently relied on a provision of his agency's law in his advice to the co-chair. The state employee informally advised the co-chair that this provision prohibited the co-chair from serving as an officer of both organizations. The co-chair asked the agency for an advisory opinion on this issue. The advisory opinion was later formally issued. In the opinion, the agency interpreted the law in such a way that it appeared that the co-chair could have remained as co-chair of the organization.

Although it appeared that the agency did, in effect, reverse the earlier advice that the state employee gave, this alone was not sufficient to demonstrate a violation of HRS section 84-13. There was no indication that this incident was anything other than an interpretation of law by the state employee that was later adjusted in an agency opinion. The Hawaii State Ethics Commission did not believe that HRS section 84-13 should be applied to an individual's interpretation of the law administered by the individual's agency that the agency later reverses. Such circumstances would not amount to a misuse of position under HRS section 84-13. The Commission believed that in order for there to be a violation of HRS section 84-13 in this situation, there must have been an indication that the state employee did more than merely interpret the law as he saw fit. The charge appeared to imply that the state employee deliberately misinformed the co-chair in order to disadvantage the organization. However, there was no evidence of this.<sup>6</sup> Absent any

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<sup>6</sup> In an appearance before the Hawaii State Ethics Commission, counsel for the complainant stated that there was no information that he was aware of concerning the state employee's "motivation" for the statements that he made to the co-chair and to others. Counsel acknowledged to the Hawaii State Ethics Commission that there was no evidence of any particular statements



information indicating that this was anything other than an interpretation of law that was later reversed by the agency, the Commission did not believe that it could find a violation of HRS section 84-13 in this instance. To determine otherwise would radically expand the Commission's jurisdiction into the oversight of other agencies' interpretations of their own laws. If the Hawaii State Ethics Commission treated a reversal of a state employee's interpretation of law as a violation of the State Ethics Code, then this would create a chilling effect on all state employees who are required to interpret state law. In addition, this would fly in the face of well established procedures for appealing adverse state decisions.

The charge alleged that during a critical time period, the state employee advised the organization that certain planned activities would violate his agency's laws. Based on this advice, the organization refrained from these activities. After the critical time period passed, the agency reversed the employee's advice. The charge alleged that the employee's actions in this instance violated HRS section 84-13.

In advising the organization in this situation, the state employee was interpreting a provision of his agency's law. The state employee interpreted the law in a certain way. Based on this interpretation, a number of individuals asked for an opinion from the agency about the application of this law. In response to these requests for advice, the agency later issued an opinion that appeared to alter the state employee's earlier advice.

Again, it did not appear that there was sufficient evidence to show a violation of HRS section 84-13. There was no evidence that the state employee's initial interpretation was anything other than a good-faith interpretation of law. The Commission believed that a finding of a violation of HRS section 84-13 must rest on more than a reversal in the interpretation of a law by a state employee in a subordinate position. The Commission did not believe that HRS section 84-13 was intended to cover this type of situation.

The charge alleged that the state employee made a particularly derogatory statement to the media about the individual the organization supported. The charge also generally alleged that statements the employee made to the media about the organization and the individual it supported violated HRS section 84-13.

According to media reports attached to the charge, the state employee made a number of statements concerning the organization and the individual it supported. One particular statement made a derogatory reference to the individual whose interests were promoted by the organization. The other statements appeared to be the state employee's acknowledgments that his agency was investigating the organization, and statements to the effect that the state employee believed that there was wrongdoing by the organization and the individual it supported.

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and actions that were allegedly intentionally designed to harm the complainant. The complainant's failure to posit any motivation to cause harm to the organization seriously undercut any claim of an HRS section 84-13 violation.

The organization essentially claimed that the state employee's statements tended to bias the agency's process. The allegation was that the state employee's comments were generally derogatory. The charge argued that the state employee did not act impartially, as his position required.

Because the complainant did not establish (and specifically denied any knowledge of) any motive on the employee's part to accord to the competitors of the organization any unwarranted advantages by the employee's allegedly derogatory statements, the Hawaii State Ethics Commission could not conclude that the state employee attempted to grant any unwarranted advantage, and, if so, to whom. Any statement that the employee made in his state capacity in regard to any specific situation involving those who came before his agency would often tend to be, by mere happenstance, favorable to one organization or individual, while unfavorable to his or her competitor or competitors. In short, there was insufficient evidence that the state employee intended to give unwarranted advantages to another in this case.

At the same time, the Hawaii State Ethics Commission acknowledged, for the record, that its jurisdiction did not encompass tort law, such as defamation, or the abuse of constitutional rights, such as due process. The Commission did not imply that other laws had been violated, but noted, for the record, that there were other laws that might apply to the conduct of a state employee that were outside of the jurisdiction of the Hawaii State Ethics Commission. This was acknowledged by the complainant as well, as indicated by its filing of a lawsuit, as mentioned earlier in this opinion.

The charge also alleged that the state employee had caused or permitted to be displayed in the public area of his agency's office, a piece of derogatory material aimed at the individual whose interests were promoted by the organization. This allegation was not addressed in the employee's answer.

Through its staff, the Hawaii State Ethics Commission confirmed that there were actually several separate pieces of derogatory material in the public area of the agency's office. The individual the organization supported was the subject of all of these pieces. The Commission believed that it was fair to say that with respect to the individual, the pieces were derogatory. Some of the pieces were visible from the entryway into the office. Another was less conspicuous.

The complainant believed that the derogatory material showed a bias on the state employee's part with respect to the agency's proceedings against the organization. This was similar to the complainant's previous allegations that contended that the state employee had made derogatory statements about the individual and the organization to the media. Again, for the reasons discussed above, the Hawaii State Ethics Commission did not believe that it was the appropriate body to resolve this issue.

The placing in public view in the public area of the state employee's agency of derogatory material raised issues of the individual's constitutional due process rights and the state employee's First Amendment rights. The Commission believed that a court was the appropriate place to resolve these issues. The Commission did not believe that it

was appropriate to apply HRS section 84-13 to this situation. If the Hawaii State Ethics Commission were to interpret HRS section 84-13 as applying to this situation, then the Commission would be placed in the position of policing due process rights, First Amendment rights, and various torts arising from administrative adjudications. The Hawaii State Ethics Commission did not believe that the Legislature intended that the Commission take on such a role. The Commission noted that the State's Administrative Procedures Act, chapter 91, HRS, already provides for judicial review of administrative adjudications.

With respect to other matters germane to this case, the Hawaii State Ethics Commission also noted that, sometime after filing his answer, the state employee obtained new counsel, a special deputy attorney general. The state employee's new counsel submitted a letter to the Hawaii State Ethics Commission, arguing that counsel for the complainant organization, because he was also an attorney for the complainant, should not be allowed to file the charge on behalf of the complainant. Rather, an "officer," for example, of the complainant's organization should have been required to file the charge. The state employee's new counsel also contended that the charge was not a properly sworn charge, based on the language used by the notary public in the charge.

The Hawaii State Ethics Commission dismissed these assertions in deciding this case, since these matters had not been raised by the state employee's first attorney, who had filed the state employee's answer to the charge. Further, the Hawaii State Ethics Commission found these assertions to lack merit. The Commission had in the past allowed an organization's attorney to file a charge. HRS section 84-1 provides that chapter 84, HRS, shall be "liberally construed," and the Commission has thus allowed representatives of organizations to file charges. The Commission also believed that the charge was sufficiently sworn to because the notary public administered an oath to the attorney for the organization, and the last sentence in the charge asserted that the facts stated in the charge were true to the best of the complainant's attorney's knowledge. The Commission believed that the organization's attorney believed that he was signing the charge under oath, and the notary public had in fact administered an oath. Further, the organization's attorney stated to the Hawaii State Ethics Commission's executive director that he had signed the charge "under oath." The Commission believed that this sufficiently bound the organization's attorney to having signed the charge under oath.

The Commission also noted for the record that the state employee's new counsel's recent involvement in this case stemmed from his recent hiring by the Office of the Attorney General to represent the state employee and his agency in the federal civil lawsuit referred to above.

Finally, the Commission noted for the record that the attorney for the complainant appeared before the Hawaii State Ethics Commission at one of its regularly scheduled meetings for approximately ninety (90) minutes to argue the merits of the complainant's charge. After he left the meeting, the Hawaii State Ethics Commission discussed the merits of this case, and voted to issue an informal advisory opinion, in accordance with HRS section 84-31(b), finding no violation of the State Ethics Code in this case.

In summary, the charge argued that the state employee violated two sections of the Hawaii State Ethics Code, HRS section 84-12 and HRS section 84-13. The Commission believed that there was no violation of HRS section 84-12 because the information disclosed by the state employee was not confidential. It appeared that all of the information before the employee's agency was treated as public information. Although the complainant later argued that this information was confidential because of the complainant's constitutional right to privacy, the Commission believed that the State courts were the proper bodies to determine whether the complainant's constitutional right to privacy was violated.

The charge alleged that the state employee violated HRS section 84-13 by, on two occasions, giving erroneous advice to the organization and thereby damaging the organization. The Commission did not believe that it could find a violation in these instances. There was simply no evidence that the employee's advice was anything more than the employee's interpretation of law, which was later reversed by the employee's agency.

The charge also alleged that the state employee violated HRS section 84-13 by making biased statements to the media and by placing in the public area of his agency derogatory material aimed at the individual whose interests were promoted by the organization. The charge essentially argued that both of these actions indicated a bias on the state employee's part against the organization, and unfairly prejudiced the agency against the organization for the benefit of the organization's competitors. While the Commission recognized the seriousness of these allegations, the Commission believed that these allegations were issues to be addressed in the courts and not by the Hawaii State Ethics Commission. The charge's allegations raised issues of due process rights, First Amendment rights, and conduct in violation of one or more torts. These were issues for the courts, and were beyond of the jurisdiction of the Hawaii State Ethics Commission. Finally, the Hawaii State Ethics Commission found insufficient evidence of an attempt by the state employee to accord unwarranted advantages to the organization's competitors, as the charge alleged.

Dated, Honolulu, Hawaii, June 19, 2002.

#### HAWAII STATE ETHICS COMMISSION

Cassandra J.L. Abdul, Chairperson  
Ronald R. Yoshida, Vice Chairperson  
Eloise Lee, Commissioner  
Dawn Suyenaga, Commissioner

Note: Commissioner Carl Morton, M.D., recused himself from the consideration of this informal advisory opinion.